

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	

**OPPOSITION OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
TO FAIRPOINT’S PETITION FOR WAIVER OF CERTAIN
HIGH-COST UNIVERSAL SERVICE RULES**

The National Cable & Telecommunications Association (NCTA)¹ opposes the petition for waiver filed by Fairpoint Communications, Inc. (Fairpoint).² Fairpoint’s waiver petition is yet another attempt to expand limited Connect America Fund (CAF) Phase I incremental support beyond its intended purposes. For the reasons explained below, Fairpoint’s petition falls well short of satisfying the stringent standards for obtaining a waiver of the Commission’s rules and therefore it should be denied.

The Commission established the \$300 million CAF Phase I mechanism in order to create an incentive for price cap incumbent LECs to commit to bringing broadband to unserved areas. As the Commission explained in the *CAF Order*, “CAF Phase I incremental support is designed to provide an immediate boost to broadband deployment in areas that are unserved by any

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$185 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

² Fairpoint Communications, Inc. Petition for Waiver, WC Docket No. 10-90 *et al.* (filed Sept. 10, 2012) (Fairpoint Petition); *Wireline Competition Bureau Seeks Comment on Fairpoint Communications Petition for Waiver of Certain High-Cost Universal Service Rules*, WC Docket Nos. 10-90, 05-337, Public Notice, DA 12-1473 (Wireline Comp. Bur., Sept. 11, 2012).

broadband provider.”³ The Commission intended to achieve this result by conditioning a carrier’s receipt of support on a requirement “to deploy broadband to a number of locations equal to the amount it accepts divided by \$775.”⁴

In its petition, Fairpoint seeks a waiver of the “\$775 per location” rule, as well as the deadline for electing to accept CAF Phase I support, and asks for authority to use \$2.8 million of Phase I funding it previously declined to serve roughly 700 locations in the state of Maine at a cost of roughly \$4000 per new location.⁵ The proposal is contingent on Fairpoint successfully resolving pending litigation with the Maine PUC, which believes that Fairpoint *already* is obligated to extend broadband service to these locations pursuant to its prior merger commitments in the state.⁶

The Commission should reject Fairpoint’s waiver request because it fails to satisfy the legal standards required to issue the requested relief.⁷ The waiver petition relies entirely on the argument that a waiver is in the public interest because it would enable Fairpoint to bring broadband service to locations that otherwise would not have service.⁸ But this does not constitute the type of special circumstances that would warrant a waiver because the Commission specifically anticipated that this result would occur. In establishing the \$775 per

³ *Connect America Fund, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17717, ¶137 (2011) (*CAF Order*).

⁴ *Id.* at ¶ 138.

⁵ Fairpoint Petition at 11.

⁶ The Commission’s rules plainly provide that “CAF Phase I incremental support will not be used to satisfy any merger commitment or similar regulatory obligation.” *CAF Order*, 26, FCC Rcd at 17720-21, ¶ 146. Accordingly, if the litigation is resolved in favor of the Maine PUC, Fairpoint will be compelled to build to these locations without any Phase I funding.

⁷ See, e.g., *Accipiter Communications*, 25 FCC Rcd 12663, 12667, ¶ 12 (Wireline Comp. Bur. 2010) (petitioner failed to meet its burden of demonstrating special circumstances that would warrant waiver of universal service rules).

⁸ Fairpoint Petition at 14-15.

location threshold, the Commission fully recognized that some carriers might decline some (or all) of their funding and consequently that some locations would not be served until CAF Phase II funding was made available. Specifically, the Commission concluded that the primary goal of the program is “to reach a significant number of relatively low-cost locations, not to ensure that the entire \$300 million offered for Phase I is accepted. . . . To the extent carriers have already deployed to the low-cost areas in their territories, then those carriers’ remaining unserved areas may be better candidates for CAF Phase II.”⁹

The waiver petition ignores the Commission’s clear and consistent statements that some Phase I money might not be claimed and that some high-cost locations would more appropriately be covered by the Phase II mechanism. Like previous price cap LEC waiver petitions,¹⁰ the Fairpoint petition seems to represent a counteroffer to the Commission. While Fairpoint is not willing to build to new locations at the \$775 per location offered by the Commission, apparently it would be willing to reach additional unserved locations in its territory if it is provided with \$4000 per new location.

As NCTA has explained previously, there is nothing inherently wrong with a system that provides funding to worthy projects based on proposals submitted by broadband providers.¹¹ All types of broadband providers, including cable operators, might be capable of extending facilities beyond their existing service areas if they could specify the amount of funding per location as Fairpoint has done in its waiver petition (and many might be able to do it for less than the \$4000 per location price tag that Fairpoint has proposed). But the Commission declined to adopt such a

⁹ *CAF Second Reconsideration Order*, WC Docket No. 10-90 *et al.*, Second Order on Reconsideration, 27 FCC Rcd 4648, 4654, ¶ 20 (2012); *see also CAF Order*, 26 FCC Rcd at 17719-20, ¶¶ 144-45.

¹⁰ Windstream Election and Petition for Waiver, WC Docket No. 10-90 *et al.* (filed July 24, 2012) (Windstream Petition)

¹¹ Opposition of the National Cable & Telecommunications Association to Windstream’s Petition for Waiver, WC Docket No. 10-90 (filed Aug. 24, 2012).

program and Fairpoint has not identified any special circumstances to warrant a decision allowing it to receive funding in this way. To the contrary, the only special circumstance Fairpoint has identified is its desire to use more than the allowed \$775 per household to provide broadband to areas which the Maine PUC contends that Fairpoint is already obligated to serve pursuant to a prior agreement in a merger proceeding.¹² As Fairpoint acknowledges, if a court agrees with the Maine PUC on this issue, Fairpoint is ineligible to use CAF Phase I funding in the manner proposed in its waiver petition.¹³

Fairpoint asserts that grant of its waiver will not harm anyone because the \$300 million identified by the Commission as available for CAF Phase I “is targeted for use by price cap carriers.”¹⁴ Fairpoint is incorrect in suggesting that the unused portion of the \$300 million could, or should, be used only by price cap carriers. The Commission fully contemplated that the entire \$300 million amount would not be used in CAF Phase I funding, and stated that “[t]o the extent incremental support is declined [by price cap carriers], it may be used in other ways to advance our broadband objectives pursuant to our statutory authority.”¹⁵ The Commission provided a number of examples of other uses for foregone CAF Phase I support such as minimizing high-cost support budget fluctuations that might arise if it granted any petitions for waiver, reallocating funds to support broadband adoption efforts, and reducing the contribution burden on consumers.¹⁶ Any one of these options would be a better use for “leftover” CAF Phase I money than giving Fairpoint \$4000 per household to provide broadband service in areas where it may already have a state regulatory obligation to provide such service.

¹² Fairpoint Petition at 14-15, 17.

¹³ *Id.* at 14-15.

¹⁴ *Id.* at 18.

¹⁵ *CAF Order*, 26 FCC Rcd at 17717, ¶ 138.

¹⁶ *Id.* at n.221.

In sum, the petition falls well short of meeting the stringent standards that govern issuance of a waiver and should be rejected by the Commission. Instead of waiving the Phase I requirements as proposed by Fairpoint (and three other price cap LECs, to date),¹⁷ the Commission should move forward expeditiously in developing the framework for distributing CAF Phase II support.

Respectfully submitted,

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¹⁷ See Petition of Waiver of Alaska Communications Systems Group, Inc., WC Docket Nos. 10-90, 05-337 (filed Sept. 26, 2012); Windstream Petition; CenturyLink Petition for Waiver, WC Docket No. 10-90 *et al.* (filed June 26, 2012).